1982

Zions First National Bank v. M-K Investment Co. et al : Brief of Respondent

Utah Supreme Court

Paul N. Cotro-Manes; Attorney for Appellants;
John H. Allen; Carl E. Kingston; John G. Marshall; Attorneys for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, A National Association, Plaintiff and Respondent, vs. M-K INVESTMENT COMPANY, J. O. KINGSTON, FRANK A. NELSON, JR., PAUL W. NELSON, and WILLIAM D. MAXWELL, Defendants and Appellants.	:	No. 18308

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third Judicial
District Court of Salt Lake County, Utah
Honorable David B. Dee, Judge

PAUL N. COTRO-MANES
Attorney for Appellants,
Paul W. Nielson and William
D. Maxwell
Suite 280, 311 South State Street
Salt Lake City, Utah 84111-2377

CARL E. KINGSTON
Attorney for Appellant,
J. O. Kingston
53 West Angelo Avenue
Post Office Box 15809
Salt Lake City, Utah 84115

JOHN G. MARSHALL
Attorney for Appellant,
Frank W. Nelson, Jr.
135 South Main
Terrace Suite
Salt Lake City, Utah 84111

JOHN H. ALLEN
RANDALL D BENSON
Greene, Callister & Nebeker
Attorneys for Respondent
800 Kennecott Building
Salt Lake City, Utah 84133

TABLE OF CONTENTS

STATUTES CITED

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, A National Association, Plaintiff and Respondent, vs. M-K INVESTMENT COMPANY, J. O. KINGSTON, FRANK A. NELSON, JR., PAUL W. NELSON, and WILLIAM D. MAXWELL, Defendants and Appellants.	:	No. 18308

BRIEF OF RESPONDENT

STATEMENT OF FACTS

On March 26, 1979, the defendant, M-K Investment Company executed a Promissory Note in favor of the plaintiff, Zions First National Bank, for the sum of $150,000.00, together with interest thereon from March 26, 1979, at the annual percentage rate of 2.5% above the prime rate of Zions First National Bank. To secure payment of the Promissory Note, the plaintiff took an "Assignment of Monies" from M-K Investment Company and also required and received Continuing Guarantees of Credit from the defendants, J. O. Kingston, Frank A. Nelson, Jr., Paul W. Nielson, and William D. Maxwell, whereby each individual unconditionally guaranteed prompt payment of the Promissory Note.

M-K Investment Company failed to pay the Promissory Note according to its terms and the plaintiff brought its action against M-K Investment Company and the four guarantors. All of the defendants filed Answers and Cross-claims. Subsequently, a petition in Bankruptcy was filed in the United States Bankruptcy Court for the District of Utah, naming M-K Investment Company as the debtor, thus staying further action against M-K Investment Company.

In his Answer to the Complaint, J. O. Kingston admitted there was an unpaid obligation and further admitted his written guarantee of that obligation. Similarily, Frank A. Nelson, Jr., Paul W. Nielsen, and William D. Maxwell, in their responses to the plaintiff's Requests for Admissions, each admitted that there was an unpaid obligation owing to the plaintiff and, also admitted, in their Answers to the Complaint that they each executed guarantees for that obligation. Only the amount of the unpaid obligation was contested by the guarantors. That issue was resolved at a hearing held before the Court on March 31, 1982, and is not an issue on this appeal.

In their Answers to the Complaint, the defendants, Paul W. Nielson and William D. Maxwell, raise, as their only affirmative defenses, the following:

(1) That the plaintiff breached an alleged promise and representation to take adequate and full security by either waiving such security or by failing to obtain adequate and full security in the first place;

(2) That the plaintiff, having adequate and full security, refused to either foreclose its lien on that security or assign the security to the individual guarantors so that they could foreclose the lien;

(3) That the plaintiff received payment of the obligation; and,

(4) That the plaintiff released and discharged one or more of the other named defendants without reserving its rights against the defendants, Paul W. Nielson and William D. Maxwell, thereby releasing them also.

On December 7, 1981, after completing discovery, the plaintiff filed its Motion for Summary Judgment. All of the parties filed memoranda and affidavits either supporting or opposing the Motion for Summary Judgment. The matter was heard before the Court on January 5, 1982, and, on February 5, 1982, the Court entered a Partial Summary Judgment holding each of the individual guarantors liable to the plaintiff but refusing to fix the amount of that liability because the plaintiff had not adequately established the amount of the obligation.

On March 12, 1982, the plaintiff filed a second Motion for Summary Judgment for the purpose of establishing the amount of the liability. This matter was heard before the Court on March 31, 1982, and, on April 1, 1982, the Court entered a Summary Judgment in favor of the plaintiff for the principal amount of $150,000.0

plus $77,977.28 interest through January 5, 1982 and interest thereafter at the annual percentage rate of 2.50% above the prime interest rate at Zions First National Bank, together with $2,500.00 attorney's fees and $84.25 costs.

The defendants, Paul W. Nielson and William D. Maxwell have appealed to this Court, seeking a reversal of the Partial Summary Judgment of liability entered by the District Court on February 5, 1982.

QUESTIONS PRESENTED

Essentially, the appellants have raised two questions on appeal.

QUESTION NO. 1: Are there any unresolved issues of fact that were material to the District Court's decision granting summary judgment in favor of the plaintiff?

QUESTION NO. 2: Did the District Court err with respect to any of its conclusions of law?

ARGUMENT

POINT I

THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

The defendants, Paul W. Nielson and William D. Maxwell, allege in their brief that the Partial Summary Judgment was

improper due to disputed material issues of fact. They specifically point to four purported material issues of fact, First, whether the plaintiff was to take, as security for the Promissory Note in question, an assignment from M-K Investment Company of a real property mortgage. It should be noted at the outset that this issue was not raised in the pleadings and was, therefore, not properly before the District Court. The District Court would have erred if it had denied the plaintiff's Motion for Summary Judgment because of a purported material issue of fact that was not properly before the Court.

Furthermore, even if the issue of the plaintiff taking an assignment of the real property mortgage had been properly raised as a defense, the parol evidence rule would prevent the defendants from proving an oral agreement by the plaintiff to take such an assignment as additional collateral. The plaintiff specifically denies representing that it would take an assignment of a real property mortgage. Even if such a representation had been made, in order for the defendants to have relied upon it as a basis for executing the written guarantees, the representation must have been made prior to or contemporaneous with the execution of the written guarantees. The written guarantees are unambiguous. They make no mention of being conditioned on the plaintiff's taking an assignment of a real property mortgage. For the defendants to admit on one hand that they executed written

guarantees that are clearly unconditional, promising prompt payment of the indebtedness of M-K Investment Company to the plaintiff, and then to allege, on the other hand, that they executed the written guarantees only on the condition that the plaintiff would take an assignment of a real property mortgage, is a blatant contraction.

Under the parol evidence rule, Utah Code Annotated §78-25-16,

> (P)arole evidence may not be given to change the terms of a written agreement which are clear, definite and unambiguous. To permit that would be to cast doubt upon the integrity of all contracts and to leave a party to a solemn agreement at the mercy of the uncertainties of oral testimony given by one who, in the subsequent light of events, discovers that he made a bad bargain. E.A. Strout Western Reality Agency, Inc. v. Broderick, 522 P.2d 144 (Utah, 1974)

Utah had long recognized that absent fraud, mistake or ambiguity, the parol evidence rule bars the admission of evidence of prior or contemporaneous oral agreements which are in conflict and at varience with a written instrument. See i.e. Security Leasing Company v. Flinco, Inc., 23 Utah 2d 242, 461 P.2d 460 (1969); Starley v. Deseret Foods Corporation, 74 P.2d 1221 (Utah, 1938); and McCormick v. Levy, 37 Utah 134, 106 P. 660 (1910).

As stated above, the Continuing Guarantees of Credit are clear and unambiguous. Furthermore, no mistake or fraud has been alleged by any of the defendants. Under the parol evidence rule, any evidence of a prior or contemporaneous agreement contradicting

the clear language of the written guarantees would be, as a matter of law, inadmissable. The alleged representation by the plaintiff, to take an assignment of the real property mortgage, would be just such an agreement. The individual defendants as principals of M-K Investment Company, signed unconditional guarantees in order to obtain a loan from the plaintiff. The loan having been made and the defendants having received the benefit of the guarantees, they now seek to vary the terms of those written guarantees by alleging they were conditioned on the plaintiff taking an assignment of the real property mortgage. Since the parol evidence rule prevents the individual defendants from proving at trial that the plaintiff made such a representation, the issue of whether the plaintiff made the representation was not an issue of fact that was material to this lawsuit.

The second purported material issue of fact is whether the plaintiff made a representation that it would look to its collateral before looking to the individual guarantors. Again, the defendants, Paul W. Nielsen and William D. Maxwell did not raise this issue in their pleadings. J.O. Kingston was the only defendant to raise this issue, and in his Answers to Plaintiff's First Set of Interrogatories, J. O. Kingston stated, "this answering Defendant does not now recall any specific conversation with any officer of Plaintiff where he was told that Plaintiff would look first to the collateral securing the obliga-

tion." Again, the District Court would have erred if it had denied the plaintiff's Motion for Summary Judgment because of a purported material issue of fact that was not properly before the court.

Additionally, the parol evidence rule would prevent the individual defendants from presenting evidence concerning a representation by the plaintiff that it would look first to its collateral. For the same reasons as discussed above, this second purported material issue of fact was not a basis for the District Court to deny the plaintiff's Motion for Summary Judgment.

The third purported material issue of fact concerns the value of the collateral which the defendants claim the plaintiff has lost or impaired. The issue of whether the plaintiff has lost, impaired or waived any of its collateral is a legal issue which shall be addressed below. However, simply stated, it is the plaintiff's position that since, as a matter of law, it has not lost, impaired or waived any of its collateral, the factual issue concerning the value of that collateral was not material to the lawsuit.

The fourth and final purported material issue of fact involves what has happened to the proceeds from the various obligations listed in the Assignment of Monies taken by the plaintiff as security for its loan to M-K Investment Company. Again, it is the plaintiff's position that this issue was not material

to the lawsuit, since, as explained below, the plaintiff was never legally obligated to look to the Assignment of Monies before pursuing the individual guarantors.

A close analysis of each of the purported material issues of fact raised by the defendants, Paul W. Nielsen and William D. Maxwell, clearly shows that there was no genuine issue as to any material fact.

POINT II

ZIONS FIRST NATIONAL BANK WAS ENTITLED TO JUDGMENT IN ITS FAVOR AS A MATTER OF LAW.

The defendants' final attack on the Partial Summary Judgment focuses on the District Court's conclusions of law. First, they argue that since the plaintiff did not pursue its security before pursuing the individual guarantors, it released the individual guarantors, at least to the extent of the value of the security. Clearly, this is not the law in Utah. In the recent case of Strevell-Paterson Company, Inc. v. Michael R. Francis, No. 17598 (Utah, May 12, 1982), this Court addressed the same issue and held that where the guarantee in question is an absolute guarantee of payment, and not a mere guarantee of collection, the guaranteed party need not pursue its remedies against the debtor or the security before proceeding directly against the guarantor.

The defendants next argue that the plaintiff failed to perfect its interest in its collateral and by so doing has released,

surrendered, impaired or otherwise harmed the collateral, thus releasing the individual guarantors to the extent of the value of the collateral. It is very important to note that, without exception, every source of law cited by the defendants in their brief deals with a situation where the creditor had actually taken security and then released, surrendered, impaired or otherwise harmed it. Since the plaintiff never took an assignment of the real property mortgage, and indeed was never obligated to do so, all of the law cited by the defendants on this point is inapposite as to the real property mortgage. The only question is whether the plaintiff has waived any of the collateral which it actually did take, i.e., the Assignment of Monies. As stated in the plaintiff's Memorandum in Support of Motion for Summary Judgment, Utah Code Annotated 70A-9-501(1) provides:

> When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 70A-9-207. The rights and remedies referred to in this subsection are cumulative. (Emphasis added)

"(T)he intent of the code was to broaden the options open to a creditor after default rather than to limit them under the old

theory of election of remedies." Michigan National Bank v. Marston, 29 Mich. App. 99, 185 N.W.2d 47 (1970). Discussing the rights of a creditor under Article 9 of the Commercial Code, an Illinois court stated, "(A) creditor is able to pursue any one of a number of remedies against a debtor until a debt is satisfied." Olsen v. Valley National Bank of Aurora, 91 Ill. App.2d 365, 371, 234 N.E.2d 547, 550 (1968). Additionally, the Washington Supreme Court, citing Professor Gilmore, stated, "Nothing the secured party may do to collect his debt through the process of law courts will operate to destroy his security interest..." Foster v. Knutson, 527 P.2d 1108 (Wash. 1974).

Therefore, the plaintiff did not waive its security by choosing to pursue the individual guarantors rather than choosing to foreclose its security interest. The plaintiff has not lost its security either for itself or for the benefit of the individual guarantors.

The legal issues raised in the appellants' brief were properly decided by the District Court and the plaintiff was entitled to judgment in its favor as a matter of law.

CONCLUSION

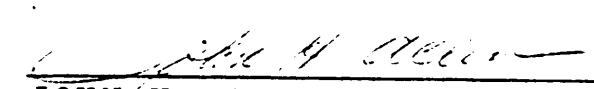
Each of the individual defendants has admitted the existence of an unpaid obligation owing from M-K Investment Company to the plaintiff. Furthermore, each individual defendant has admitted

executing a written guarantee of that unpaid obligation. The District Court resolved, as a matter of law, all of the defenses raised by the individual defendants and appropriately granted the plaintiff's Motion for Summary Judgment. On appeal, the defendants, Paul W. Nielsen and William D. Maxwell claim that the Partial Summary Judgment was improper due to disputed material issues of fact and erroneous conclusions of law. However, as explained above, there was no genuine issue as to any material fact and the plaintiff was entitled to judgment in its favor as a matter of law.

Zions First National Bank respectfully requests this Court to affirm the decision of the Third Judicial District Court for Salt Lake County, State of Utah, granting the Partial Summary Judgment in favor of the plaintiff.

Respectfully submitted,

GREENE, CALLISTER & NEBEKER



JOHN H. ALLEN
Attorneys for Respondent, Zions
First National Bank
800 Kennecott Building
Salt Lake City, Utah 84133

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 1982, I mailed, postage prepaid, two copies of the foregoing Brief of Respondent, to the following:

Paul N. Cotro-Maines
311 South State Street, Suite 280
Salt Lake City, Utah 84111-2377
Attorney for Appellants,
Nielsen and Maxwell

Carl E. Kingston
53 West Angelo Avenue
Post Office Box 15809
Salt Lake City, Utah 84115
Attorney for Appellant, Kingston

John G. Marshall
135 South Main
Terrace Suite
Salt Lake City, Utah 84111
Attorney for Appellant, Nelson